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IN THE

Supreme Court of the United States

October Term, 1968

Nos. 18 and 18

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA,

Intervenor-Appellants,

and

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, and W. F. DENMAN, JR., Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas,

Appellants,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellees, pursuant to Rule 58, hereby petition for rehearing of this Court's decision of November 18, 1968.

I

This Court's opinion of November 18, 1968, misconceives the findings and conclusions of Arbitration Board No. 282 regarding the safety functions of firemen on diesel locomotives and its primary reliance on these findings and conclu-

sions is thus misplaced. To indicate the crucial significance of this misconception, we refer first to the following statement from this Court's opinion:

> "We think it plain that in striking down the full-crew laws on this basis, the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause. The evidence as to the need for firemen and other additional crewmen was certainly conflicting and to a considerable extent inconclusive." (Opinion, p. 7)

The Court then referred in general terms to testimony of individual witnesses and certain statistical data, and continued as follows:

> "It would hardly be possible to summarize here all the other evidence in the record relevant to the safety question, and as we have indicated, it is wholly unnecessary to do so. A brief summary of some of the findings of Arbitration Board No. 282, the panel set up pursuant to Pub. L. 88-108, should suffice to show that the question of safety is clearly one for legislative determination." (Opinion, p. 8)

Having thus stated the controlling predicate for its decision, the Court proceeded to discuss the findings which, in its view, tended to establish an appropriate basis for a legislative determination that crews consisting of six employees should be required on railroads operating freight and yard service in Arkansas.

Referring to the text of the report of Arbitration Board No. 282, the Court stated:

> "The Board stated as its very first finding:
>
> "'1. The record contains no evidence to support the charge, frequently and irresponsibly made, that firemen presently employed in road freight and

> yard service throughout the country are being paid to do nothing and actually perform no useful work.'
>
> The Board then went on to deal specifically with the various functions for which firemen were claimed to be necessary." (Opinion, p. 8)

This finding of the Arbitration Board on which the Court placed primary reliance, however, is not addressed to the safety question posed by the Court. It is concerned instead with the extraneous issue of whether firemen perform any useful work quite apart from the safety significance of such work. This is clearly apparent from a consideration of the other findings of the Board. Thus, regarding the lookout function and the signal passing work of firemen, the Board stated:

> "2. The lookout function presently assigned to the fireman is also performed by the head brakeman in road freight service and by all members of the train crew in yard service. In the great majority of cases the lack of a fireman to perform the related functions of lookout and signal passing will not endanger safety or impair efficiency because these functions can be, as they are now, performed by other crew members." (PX 20, pp. 25-26)

A similar finding was made with respect to the mechanical duties performed by firemen:

> "3. A considerable portion of the mechanical duties now performed by the fireman is not absolutely essential to the safety and efficiency of road freight and yard operations. Those duties which are essential can be performed by the engineer while the locomotive is in service and by shop maintenance personnel at other times. These arrangements would not involve the assignment of fireman's duties to members of other crafts not presently authorized to perform them." (PX 20, p. 26)

Thus, the Board clearly held that the so-called useful work performed by firemen was not safety related, that the fireman's activities merely duplicated work performed by other crew members and that safety of operations would not be impaired by eliminating this duplication. This is abundantly clear from the following distinction which the Board drew between "useful work" and safety related duties of firemen:

> "In short, although our findings on this issue do not coincide on all points with those of the Presidential Railroad Commission, and *although we think it clear that firemen are presently performing useful services,* we agree with the Commission 'that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels.' Like the Commission, however, we also believe that this conclusion should not 'preclude the occasional assignment of firemen-helpers on some of the road freight or yard runs which are atypical and which have unusual characteristics.'" (PX 20, pp. 27-28, emphasis added)

In short, the Board clearly found that only a few occasional and atypical assignments could be said to warrant the use of firemen for safety purposes regardless of whether the services performed by firemen on *typical* assignments constituted "useful work." It is on this tenuous basis that this Court held that the question of safety was a debatable one and thus appropriate for legislative determination. We respectfully suggest that this conclusion would not have been reached had the Court clearly perceived the distinction which the Arbitration Board drew between useful but duplicative functions performed by firemen and the safety significance of these "useful services."

Moreover, the Court's analysis of the report of Arbitration Board No. 282 does not include any consideration of

that Board's companion determination regarding the number of brakemen or helpers required for safety of operations. The Arbitration Board created by Congressional enactment and the Special Boards of Adjustment functioning pursuant to its directives have uniformly held that crews of two brakemen in road service and crews of one or two helpers in yard service are entirely adequate for safety of operations (PX 78, attachments 1 to 6; A. 932-33). The undisputed evidence also shows that the labor organizations, appellants here, did not seek crew sizes in excess of two brakemen or two helpers (A. 933). The awards of these Special Boards of Adjustment, moreover, were made in light of a guideline prescribed by Arbitration Board No. 282 requiring the Special Boards to give consideration to "the number of highway, street, road, railroad or other crossing or intersections to be protected" (PX 20, p. 17). The general result of the awards, taking into account this guideline among others and giving particular consideration to assurance of adequate safety, was to authorize the carriers to reduce yard crews to a consist of a foreman and one helper (A. 933-36).

Since the Arkansas statute requires a crew of six, including a foreman and three helpers on yard crews which "do switching, pushing or transferring of cars across public crossings within the city limits of the cities" in which such crews operate, the repeated determinations by the Special Boards that such switching can be safely done by crews of a foreman and one helper is of particular significance.

The lower court, we emphasize, found that both the fireman and the third brakeman or helper were redundant and had "ceased to perform significant safety functions in the operation and switching of freight trains and cars" since the mid-1950s (A. 1203). Obviously, the safety issue thus involves brakemen and helpers as well as firemen and the

Arbitration Board's findings and conclusions also relate to all of such employees.

We respectfully suggest, therefore, that this Court's analysis of the evidence relating to safety of operations not only misconceives the findings of Arbitration Board No. 282 regarding firemen but ignores them with respect to a major part of the controversy presented here.

II

We also emphasize as a basis for this petition for rehearing that this Court erred in its findings as to the delays to train service resulting from stops to adjust crews to meet Arkansas requirements. This Court's treatment of the subject is as follows:

> "Of the other matters relied upon by the District Court, the problem of delay at the state borders apparently has not changed appreciably since the days of this Court's earliest full-crew decisions, and this Court's statement of the insignificance of the problem in *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 782 (1945), is equally valid today:
>
> > "'While the full train crew laws undoubtedly placed an added financial burden on the railroads in order to serve a local interest, they did not obstruct interstate transportation or seriously impede it. They had no effects outside the state beyond those of picking up and setting down the extra employees at the state boundaries; they involved no wasted use of facilities or serious impairment of transportation efficiency. . . .'" (Opinion, p. 10)

The facts clearly established by this record show that the problem of delay at state borders has changed appreciably "since the days of this Court's earliest full crew decisions." Those early decisions involved stops at border points only for the purpose of changing the number of brakemen in road crews. Today, stops are also required for the purpose of

picking up and setting off firemen. Because of differences in seniority districts and crew change points for firemen and brakemen, these stopping points are not the same as those at which brakemen must be taken off or added to the crew.

On the St. Louis Southwestern Railway Company, the third brakeman required by the Arkansas statutes is added to the crew at Malden, Missouri on runs into Arkansas and is dropped from the crew at that point on trains moving from Arkansas to Missouri and Illinois (PX 32, p. 6). On these trains, the fireman required by the Arkansas statute but not used in Missouri is added or taken off at Illmo, Missouri (PX 32, p. 6). Missouri-Pacific operations between Kanasas Ctiy and Memphis involve a comparable situation. The fireman required by Arkansas statutes joins the crew at Nevada, Missouri on southbound trains and the third brakeman is added at Crane, Missouri. On northbound trains, the procedure is reversed (PXs 1-17, p. 23). In these respects, therefore, the delays attributable to crew adjustments necessitated by the Arkansas statutes have changed appreciably since "this Court's earliest full crew decision" and this Court's contrary holding is erroneous.

CONCLUSION

Rehearing of the decision of November 18, 1968, should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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Counsel for Appellees